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Section 8(a)(1) 5, 8, 11
Section 8(a)(3) 5, 8, 11

In the Supreme Court of the United States

OCTOBER TERM, 1964

No. 7

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

JOHN BROWN, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

OPINIONS BELOW

The opinion of the court of appeals (R. 69-77) is reported at 319 F. 2d 7. The decision and order of the Board (R-22-30, 4-19) are reported at 137 NLRB 73.

JURISDICTION

The judgment of the court of appeals was entered on June 17, 1963 (R. 77). On September 16, 1963, Mr. Justice White extended the time for filing a petition for a writ of certiorari to and including October

16, 1963 (R. 78). The petition was filed on October 16, 1963, and was granted on January 6, 1964, 375 U.S. 962 (R. 79). The jurisdiction of this Court rests upon 28 U.S.C. 1254(1) and Section 10(e) of the National Labor Relations Act, as amended.

QUESTION PRESENTED

Whether the court of appeals exceeded the authorized scope of judicial review in reversing the Board's holding that the other members of a multi-employer bargaining unit committed an unfair labor practice when they responded to a strike against one member by dismissing their non-striking employees for the duration of the strike and continuing operations with replacements even though their regular employees were willing and able to work.

STATUTE INVOLVED

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 29 U.S.C., Secs. 151, *et seq.*) are as follows:

Sec. 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8(a)(3).

Sec. 8.(a) It shall be an unfair labor practice for an employer—

(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7;

* * * *

(3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization; * * *

STATEMENT

A. THE BOARD'S FINDINGS OF FACT

Respondents are retail food store operators in Carlsbad, New Mexico, who have bargained on a group basis with the Retail Clerks International Association, Local 462. Each company recognizes the Union as the bargaining agent for all its clerical employees, and each participates in joint negotiations which normally culminate in the execution of a collective bargaining agreement binding upon all (R. 22-23; 46-47).

The Union and the employers' bargaining association commenced negotiations for a new contract in February 1960. While bargaining was in progress, the employers met among themselves and agreed that all would send their employees home if the Union should strike any of the stores (R. 23; 41, 44, 52, 62, 63-64). By March 2, the parties had agreed upon all contract terms except wages (R. 23; 47). On that day, the Union authorized a strike. When the em-

ployer association was informed of this decision, it replied that it would consider a strike against any one of its members to be a strike against all (R. 48).

On March 16, the Union struck and picketed Food Jet, one of the association members. The other four employers, who operated six stores, were immediately notified, and all responded by sending home their own employees (R. 23; 41). As the employees of each non-struck employer reported for work that day, they were met by their store manager who told them that, because of the strike at Food Jet, they were locked out until further notice, or until the strike terminated (R. 31, 32, 34, 52, 57).

Each respondent thereafter continued to operate his business (R. 23). Food Jet hired replacements for the vacancies left by the strikers (R. 23; 39). The non-struck employers, while continuing their lockout, functioned with managerial personnel, with relatives of management, and with temporary help expressly hired only for the duration of the strike (R. 23; 43, 50-52, 53, 55-56, 57, 60-62). Some of these employers also obtained the services of employees transferred from other stores outside the bargaining unit (R. 33, 38, 55-56).

Meanwhile, the parties continued to negotiate and, on April 22, 1960, they reached final agreement on all contract terms. Thereupon, the Union terminated the strike. Respondents then dismissed the temporary replacements and recalled their regular employees (R. 23; 57, 63, 66-67).

B. THE BOARD'S DECISION AND ORDER

The Board (with two members dissenting) concluded that the non-struck employers violated Sections 8(a)(1) and (3) of the Act by temporarily replacing their regular employees because of the Union's strike against Food Jet. The Board distinguished *National Labor Relations Board* v. *Truck Drivers Local No. 449*, 353 U.S. 87 (also known as the *Buffalo Linen* decision), which held that where one member of a multi-employer unit is struck, the other members may lock out their employees, as follows (R. 24-25):

> While the present case has its similarity to the *Buffalo Linen* situation, there is a critical difference between the two cases. The underlying rationale of *Buffalo Linen* was that a shutdown was deemed appropriate to preserve the bargaining unit, and that the lockout incidental to such shutdown was not unlawful. In the instant case, however, there was no shutdown to protect a bargaining unit, for Respondents continued to operate by hiring replacements after locking out their employees. Therefore, whatever defensive validity there may be for shutting down in a whipsaw context, such consideration is inappropriate where, as here, the employers do not shut down * * *.

The Board ordered respondents to cease and desist from their unfair labor practices and to reimburse their employees for lost pay (R. 27, 12-13).

C. THE DECISION OF THE COURT OF APPEALS

The court of appeals denied enforcement of the Board's order. It held that temporary replacement of

regular employees was an appropriate defensive measure to preserve the integrity of the multi-employer bargaining unit (R. 69-76). Chief Judge Murrah dissented on the ground that "the process of balancing conflicting interests * * * [is] a function * * * within the Board's exclusive province" and that the "specialized judgment" of the Board was entitled to stand in this case (R. 76-77).

SUMMARY OF ARGUMENT

National Labor Relations Board v. *Truck Drivers Local No. 449*, 353 U.S. 87, held that in case of a strike against one member of a multi-employer bargaining unit the other members may lock out their employees as a means of preserving the integrity of the multi-employer unit. In that case the Board concluded that in the interest of preserving multi-employer bargaining an employer might engage in certain conduct which would literally "interfere" with concerted activities and result in "discrimination" against union members. This Court sustained the Board's reasoned accommodation of legitimate conflicting interests of employers and employees.

In the present case the Board again evaluated the competing interests in multi-employer bargaining and concluded that, although respondents were entitled to lock out their employees when the Union struck Food Jet, they went beyond defense of the multi-employer unit and violated rights guaranteed by Section 7 of the Act when they resumed operations not with their regular employees, who were ready and willing to work, but with temporary replacements.

This conclusion was sound. Respondents could have preserved the solidarity of the multi-employer unit and put themselves "in the same boat" as Food Jet by resuming their operations with their own regular employees—either in full or in such numbers as to maintain a level of operations similar to that of the struck employer. By replacing employees who were ready to work, respondents engaged in conduct that was retaliatory rather than defensive.

In effect, the court of appeals undertook its own appraisal and accommodation of the conflicting interests and substituted its judgment for that of the Board. This substitution of a judicial evaluation for the expert judgment of the statutory agency exceeded the court's authority under established principles announced by this Court.

ARGUMENT

THE COURT OF APPEALS EXCEEDED THE AUTHORIZED SCOPE OF JUDICIAL REVIEW BY REVERSING THE ADMINISTRATIVE ACCOMMODATION OF COMPETING INTERESTS.

Our basic argument is that the court of appeals exceed the authorized scope of judicial review in reversing the Board's holding that the other members of a multi-employer bargaining unit commit an unfair labor practice if they respond to a strike against one employer by dismissing their non-striking employees for the duration of the strike and continue operations with replacements even though their regular employees are willing and able to work. We show first, by analyzing the competing interests of employers and employees involved in this question, that the Board achieved the correct accommodation of the competing interests. We then point out that mere disagreement

with the Board would not justify setting aside its order because the Board's accommodation, being reasonable, is binding on judicial review.

A. THE BOARD APPLIED THE STATUTE IN A WAY WHICH ACHIEVED A SOUND ACCOMMODATION OF THE COMPETING INTERESTS OF EMPLOYERS AND EMPLOYEES IN MULTI-EMPLOYER BARGAINING.

Like *National Labor Relations Board* v. *Truck Drivers Local No. 449*, 353 U.S. 87 [hereinafter "*Truck Drivers*"], this case involves the scope of permissible response by members of a multi-employer bargaining unit to a strike by the union against one member of the unit. In the *Truck Drivers* case the question was whether the non-struck members had committed an unfair labor practice by temporarily locking out their employees during contract negotiations in response to the union's strike against one of the employer members of the unit. Such a lockout literally "interferes with" the employees' right to engage in "concerted activities" (Sections 7 and 8 (a)(1), pp. 2-3, *supra*), for it deprives non-striking employees of available work which they are willing to do, thereby enlarging the area of economic combat staked out by their bargaining representative. By depriving non-striking employees of employment because of the action taken by their union against some other employer, such a lockout also constitutes "discrimination" tending to discourage the employees from supporting the union in the future (Section 8 (a)(3), p. 3, *supra*). On the other hand, a strike against one member of a multi-employer bargaining unit seeks to use the sales and services of the remaining members to increase the pressure upon the struck employer to capitulate to the union's demand by threat-

ening him with a permanent loss of customers. Moreover, a strike against one member carries an implied threat of successive strikes against each of the other firms individually, with "the calculated purpose" of causing "successive and individual employer capitulations" (*Buffalo Linen Supply Co.*, 109 NLRB 447, 448). This whipsawing technique would destroy the integrity of the multi-employer bargaining unit.

In the *Truck Drivers* case the Board balanced these competing considerations and concluded that the employers' interest in preserving the integrity of the multi-employer unit outweighed the interest of the employees. Hence, notwithstanding the fact that such conduct might violate the Act if construed literally, the Board held that the non-struck members of a multi-employer unit could lawfully lock out their employees as a defense to a strike against one member of the unit. *Buffalo Linen Supply Co.*, 109 NLRB 447. In reviewing the Board's decision, which had been reversed by the Court of Appeals for the Second Circuit, 231 F. 2d 110, this Court recognized that, although "the Act protects the right to strike * * * this protection is not so absolute as to deny self-help by employers when legitimate interests of employers and employees collide. * * * The ultimate problem is the balancing of the conflicting legitimate interests," and that function "Congress committed primarily to the National Labor Relations Board, subject to limited judicial review." 353 U.S. at 96. Accordingly, having determined that the Board had "correctly balanced the conflicting interests" (353 U.S. at 97), this Court sustained the Board's decision.

The present case concerns a situation in which the Board was required, as in *Truck Drivers*, to balance competing interests. When the Union struck Food Jet (one employer in the bargaining unit), the others —*i.e.*, respondents—were entitled under the *Truck Drivers* decision to lock out their own employees and thereby treat the strike against Food Jet as a strike against all employers in the unit.[1] This privilege continued even after Food Jet attempted to resume its own operations. But the balance shifted considerably when respondents resumed operations not with their regular employees—who were available and willing to work—but with supervisory personnel, relatives of management, new employees hired on a temporary basis, and others—all of whose sole virtue apparently was that they had no connection with the Union.

Preliminarily, it should be noted that the replacement of regular employees under these circumstances is obviously a literal violation of the Act and, absent overriding justification, would plainly constitute an unfair labor practice under the applicable decisions of the Board and the courts. Regardless of respondents' motives, the continued layoff of available regular employees in favor of newcomers can only be viewed as reprisal for the Union's strike against Food Jet.[2]

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[1] Accordingly, the Board did not disturb the conclusion of the trial examiner (R. 8-9, 23-24) that the initial lockout by the stores was lawful.

[2] As the Court observed in *National Labor Relations Board* v. *Erie Resistor Corp.*, 373 U.S. 221-228:

> The employer * * * must be held to intend the very consequences which foreseeably and inescapably flow from

The Board observed that, "since no reason appears why they [the nonstruck stores] could not have continued to operate with their own employees during the strike, this constitutes a temporary replacement of employees solely because they were engaging in protected concerted activity, *i.e.*, striking against Food Jet" (R. 25). Manifestly, such action constitutes a form of "discrimination" and "interference" barred by the statute.

Moreover, it has long been settled that an employer violates Sections 8(a)(1) and (3) of the Act if he denies an ex-striker an open position because he went on strike.[3] Thus, even the struck employer, Food Jet, would have committed an unfair labor practice had it hired replacements in the place of strikers who were

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his actions and if he fails to explain away, to justify or to characterize his actions as something different than they appear on their face, an unfair labor practice charge is made out. * * * But, as often happens, the employer may counter by claiming that his actions were taken in the pursuit of legitimate business ends and that his dominant purpose was not to discriminate or to invade union rights * * *. Nevertheless, his conduct *does* speak for itself—it *is* discriminatory and it *does* discourage union membership and whatever the claimed overriding justification may be, it carries with it unavoidable consequences which the employer not only foresaw but which he must have intended. * * *

[3] *National Labor Relations Board* v. *Mackay Radio & Telegraph Co.*, 304 U.S. 333, 347; *National Labor Relations Board* v. *Remington Rand, Inc.*, 130 F. 2d 919, 927-928 (C.A. 2); *National Labor Relations Board* v. *Globe Wireless, Ltd.*, 193 F. 2d 748, 749 (C.A. 9); *Home Beneficial Life Insurance Co.* v. *National Labor Relations Board*, 159 F. 2d 280, 285 (C.A. 4); *National Labor Relations Board* v. *National Shirt Shops*, 212 F. 2d 491, 494 (C.A. 5); *National Labor Relations Board* v. *J. Mitchko, Inc.*, 284 F. 2d 573, 576-577 (C.A. 3).

willing to return to work.[4] *A fortiori* the discrimination is unfair when employees who are willing to work are replaced because their union has called a strike against another concern. And, while the effects of the discrimination may be less damaging if the replacement is temporary rather than permanent, either reprisal obviously puts pressure on the employees and constitutes interference within the meaning of the Act.

Consequently, the issue which the Board had to resolve in this case was whether the policy of preserving the integrity of the multi-employer bargaining unit, which was deemed sufficient in the *Truck Drivers* case to override the coercion and permit the non-struck employers to shut down their operations, would also justify such employers in replacing their regular employees with temporary substitutes while continuing to operate the businesses. The Board held, "in balancing the conflicting interests" (R. 25), that such replacement was "retaliatory" rather than "defensive" (R. 27) since less drastic means were available to preserve the integrity of the bargaining unit.

The Board's view is that, when one employer is struck, the remaining employers in the unit may lock out their employees whether or not the struck employer resumes operations with replacements. If the struck employer is then able to conduct business operations with replacements notwithstanding the

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[4] However, if Food Jet permanently replaced a striker before he manifested an intention to return to work, the striker would not be entitled to his old job were he later to request it. *National Labor Relations Board* v. *Mackay Radio & Telegraph Co.*, 304 U.S. 333, 345.

picketing by his regular employees, the non-struck employers may, of course, find that they are losing customers by remaining closed; the continued operations of the struck employer might exert pressure on them to make a separate settlement with the union, thereby imperiling the multi-employer bargaining unit. But their choice is not limited to remaining closed or hiring temporary replacements. They can protect themselves adequately and, at the same time, preserve the solidarity of the multi-employer unit, by resuming operations with all or some of their own employees who are willing and able to work. In short, the non-struck employer members of an association can put themselves "in the same boat" as the struck member by shutting down entirely or, if the struck employer has reopened, by resuming their own operations with their regular employees—either in full or to the extent deemed adequate to maintain a level of operations comparable to that of the struck employer.

As the Board stated in *The Kroger Company*, 145 NLRB No. 26, which involved a situation similar to the one here (mimeo dec., p. 5):

> We believe that the non-struck employer's legitimate interest is fully protected by giving him a choice between closing down or operating with those regular employees who are willing to work. Selection of the alternative is in the hands of the individual employer, and he may use his own judgment to determine which course he will pursue. The choice is his, whether the struck employer is able to function substantially as usual, or whether the struck employer is completely or virtually closed. In these circumstances there is in our opinion no valid reason why the non-struck

> employer should be entitled both to lock out his employees and continue to operate with temporary replacements for those employees * * *. [T]o permit the non-struck employer to operate with replacements while his own employees are willing to work, serves only to punish those employees because of their adherence to the striking union.

Respondents contend (Brief in Opposition, p. 11) that this accommodation of the competing interests in such circumstances is unfair because "it is simply impossible to completely shut down a retail grocery operation which necessarily maintains a large inventory of perishable merchandise." However, this consideration demonstrates only that in respondents' line of business a lockout may be more expensive as an employer weapon. That is, the argument assumes that, if a struck employer such as Food Jet were unable to hire replacements and resume operations, the other members of the multi-employer unit would be required by the unique nature of their business to remain open notwithstanding the effect this would have on the solidarity of the unit. The fact that Food Jet has succeeded in hiring replacements should surely not entitle the other employers to remedy this divisive factor inherent in the nature of their business at the expense of their regular employees.

Respondents also assert that the alternative of resuming operations with a full or partial staff of their own employees is unrealistic because "there is obviously no economic parity between an employer who is attempting to operate a store while being picketed by a union and an employer who is not being picketed" (Brief in Opposition, p. 11). This argument

assumes, however, that the Union (1) will picket the non-struck employers' stores if replacements are hired and (2) will not picket if any regular employees are retained. Both assumptions are speculative, and neither is supported by a reasoned forecast of probabilities. For if the Union originally determined to strike a single employer rather than all the employers in the unit, it might well conclude that the same policy warranted picketing no one but that employer even if his competitors were to hire replacements. Otherwise, its selective strike would produce the same result as a general strike—all stores will be operating with replacements and all will be picketed.[5] And, while the Union would have no reason to picket the non-struck employers if they retained their full regular work force, it might well engage in picketing if the non-struck employers responded by keeping only skeleton staffs for the duration of the strike. For if the Union is prepared to abandon its selective strike technique and picket all stores if replacements are hired, it might also follow the same course if a substantial portion of the regular work force of the non-struck employers were laid off.

There is no merit to respondents' suggestion that retention of only some of the non-struck employers' regular employees "would force the employer to make an inherently discriminatory selection as to which

[5] It is true, of course, that, by shifting the initiative to the non-struck employers, the Union is spared the public criticism which might result if it called a general strike against all employers in the unit—which are grocery stores in the present case. But if the hiring of replacements is foreseeable (and the perishable nature of the groceries' stock indicates it would be), then such criticism may be minimal.

employees to lay off because of union activities" (Brief in Opposition, p. 11). If all the non-struck employers' regular employees are union members, a layoff of some of those employees, prompted not by anti-union considerations but by a reduction in operations to the level of the struck employer, would not violate the Act any more than would a total layoff—which is permitted by the *Truck Drivers* case. Nor would such a partial layoff be unlawful if some of the regular employees of non-struck stores are not union members. So long as the employers selected the employees to be laid off on the basis of objective factors, such as seniority, and not on the basis of union membership or activity, no charge of illegal discrimination could be made.

Nor is there any substance to the court of appeals' suggestion that the non-struck employers' right to hire temporary replacements necessarily followed from the right recognized in *National Labor Relations Board* v. *Mackay Radio & Telegraph Co.*, 304 U.S. 333, to hire replacements for strikers (R. 73-74). The right recognized by *Mackay* is limited to hiring permanent substitutes for employees who insist upon staying on strike; it does not permit the employer to replace an employee who is willing and able to work.* In this respect, the struck employer

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* *Firth Carpet Co.* v. *National Labor Relations Board*, 129 F. 2d 633, 636 (C.A. 2); *National Labor Relations Board* v. *Luzerne Hide & Tallow*, 188 F. 2d 439, 442 (C.A. 3), certiorari denied, 342 U.S. 868; *National Labor Relations Board* v. *Anchor Rome Mills*, 228 F. 2d 775, 780 (C.A. 5); *National Labor Relations Board* v. *Robinson Freight Lines*, 251 F. 2d 639, 641 (C.A. 6); *National Labor Relations Board* v. *Shenandoah-Dives Mining Co.*, 145 F. 2d 542, 547 (C.A. 10).

differs from the others in the multi-employer unit. His employees, being on strike, are not willing and able to work. He can run his business only by hiring replacements for those employees, and this *Mackay* permits him to do. The employees of the non-struck employers, on the other hand, are all willing and able to work. If they do not work, it is only because they have been locked out. In these circumstances, there is no need for the non-struck employers to hire replacements in order to operate, and *Mackay* does not accord them any such privilege.[7] Indeed, as has been shown (p. 11, *supra*), the struck employer himself would have no privilege to replace an employee who was willing and able to work.

Similarly without substance is the court's further suggestion (R. 73-74) that to deny the non-struck employers the right to hire replacements when the struck employer resumes operations with replacements renders illusory the right to lockout which *Truck Drivers*, *supra*, accords them. As shown above (pp. 9-10, 12, *supra*), the Board's view permits the non-struck employers in the unit to lock out when one of their unit members has been struck, and they may continue the lockout *whether or not* the struck employer resumes operations with replacements.

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[7] Contrary to the view of the dissenting Board members (R. 30), it is not misleading to say that regular employees of the non-struck members are willing and able to work. Though their fellow employees are striking for a better contract which may redound to the benefit of the non-struck employees, the latter are willing, in the meantime, to continue working for their employers under the existing terms and conditions of employment.

B. IN ANY EVENT, THE COURT OF APPEALS EXCEEDED ITS AUTHORITY BY SUBSTITUTING ITS JUDGMENT FOR THAT OF THE BOARD UPON AN ISSUE ENTRUSTED BY THE STATUTE TO THE BOARD'S DETERMINATION.

As the above analysis demonstrates, the issue presented by this case involves a careful balancing of conflicting interests. The distinction drawn by the Board between defensive lockouts and reprisals in the form of temporary replacement is precisely the kind of delicate accommodation which the Board was established to achieve on the basis of its expert knowledge and its awareness of the practical consequences of action taken by the employer or the union. It is a task which is not new to the Board, for it arises in a variety of contexts in the administration of the Act. An employer may, for example, permanently replace economic strikers although such action would tend to deter employees from exercising their statutory right to strike (*National Labor Relations Board* v. *Mackay Radio & Telegraph Co.*, 304 U.S. 333, 345), but he may not offer superseniority to replacements for strikers and to strikers who are willing to abandon the strike even if his motive is merely to obtain enough workers to run his business (*National Labor Relations Board* v. *Erie Resistor Corp.*, 373 U.S. 221).[8]

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[8] Compare also *Republic Aviation Corp.* v. *National Labor Relations Board*, 324 U.S. 793 (unlawful to ban literature distribution and union solicitation by *employees* on plant property during non-working time), with *National Labor Relations Board* v. *Babcock & Wilcox Co.*, 351 U.S. 105 (not unlawful to ban literature distribution on plant property by *non-employee* organizers).

In this case, as in *National Labor Relations Board* v. *Erie Resistor Corp.*, 373 U.S. 221, 236, it is the courts' obligation to "recognize the Board's special function of applying the general provisions of the Act to the complexities of industrial life, * * * and of '[appraising] carefully the interests of both sides of any labor-management controversy in the diverse circumstances of particular cases' from its special understanding of 'the actualities of industrial relations.'" As in the *Truck Drivers* case, 353 U.S. at 96, "[t]he ultimate problem is the balancing of the conflicting legitimate interests," in which the courts' function is to exercise only "limited judicial review."

We submit, for the reasons stated above, that the Board's conclusion in the present case is eminently sound. Even if one should disagree, however, that would not justify the decision below. The balance struck by the Board, being at worst a not unreasonable application of the statute, is within its authority, and the court of appeals exceeded its power in substituting its own judgment for that of the Board.

CONCLUSION

For the foregoing reasons, the judgment of the court of appeals should be reversed and the cause remanded with instructions to enter a decree enforcing the order of the Board.

Respectfully submitted,

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